Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY,
TERRENCE M. REIDY, JOHN A. REIDY,
BRIAN J. REIDY, AND GEORGE M. REIDY,
Petitioners,

v.

TRAVELERS INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in determining that "the district court lacked jurisdiction over the employment-based discrimination claims" by finding as a fact that no formal complaint was received by the state fair employment agency.

2. Whether the Court of Appeals erred in determining as a fact that a formal complaint was not presented to the state fair employment agency within six months of the discriminatory act.

3. Whether the Court of Appeals incorrectly interpreted Massachusetts Law, Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021 (1996), by holding that "Massachusetts courts have no jurisdiction over employment-discrimination claims unless the plaintiff-employee has filed a formal complaint with the Massachusetts Commission Against Discrimination ("MCAD") within six months of the alleged discriminatory act."

3. Whether the decision of the district court is contrary to precedent of the Supreme Court.

4. Whether the district court erred by not deciding the evidence in a light most favorable to Reidy.

5. Whether the district court erred in determining as a fact that Reidy was not a qualified handicapped person.

6. Whether the district court erred by determining that in order to prevail, Reidy had to prove "that he was terminated solely because of his handicap."

7. Whether the district erred in determining that because "the plaintiff did not wait 90 days before filing the instant lawsuit in Massachusetts Superior Court on October 7, 1991," the complaint must be dismissed for failure "to follow the proper administrative procedures."

8. Whether the district court erred in deterring that Travelers provided Reidy a reasonable accommodation.

LIST OF PARTIES

Petitioners, George F. Reidy ("Reidy"), Toni E. Reidy, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 13, 1997. A petition for rehearing was denied on March 3, 1997.

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is unreported (App. A at 1A). The Judgment and Memorandum and Order of the United States District Court for the District of Massachusetts, issued on June 3, 1996, is reported at 928 F. Supp. 98 (D. Mass. 1996)(App. B at 6A).

JURISDICTION

The Court of Appeals entered its judgment on February 13, 1997, and denied a petition for rehearing on March 3, 1997. This petition is timely filed within ninety (90) days of that entry. 28 U.S.C.§ 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, §1 of the Constitution provides in pertinent part: "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

2. The Seventh Amendment to the United States Constitution provides in pertinent part: "In suits at common law, with a value in controversy shall exceed twenty ($20.00) dollars, the right of trial by jury shall be preserved."

3. Title 28, United States Code, §1332 provides in part: "The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between - (1) citizens of different states."

4. General Laws c. 151B,§4 provides in pertinent part: "It shall be an unlawful practice:

> 4. For any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under Section 5.
>
> 4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right guaranteed or protected by this Chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this Chapter."
>
> 5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this Chapter, or to attempt to do so.
>
> 16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, re-hire

> or advance an employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undo hardship to the employer's business.

5. General Laws c. 151B,§1(17) provides in pertinent part: "The term 'handicap' means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; (c) being regarded as having such impairment."

STATEMENT OF THE CASE

Procedural History

George F. Reidy ("Reidy"), originally filed this suit in the Massachusetts Superior Court for the county of Worcester, against his former employer, Travelers Insurance Company ("Travelers"), claiming a breach of the employment contract, age discrimination and handicap discrimination in violation of Massachusetts General Laws c. 151B and Massachusetts General Law c. 93, §103, and claims by his wife, Toni E. Reidy, for loss of consortium, and his children, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy, for loss of nurture. It was removed to the District Court based on diversity of citizenship.

Travelers moved for summary judgment on or about July 18, 1995, as to all claims on the basis that there was no genuine issue of material fact and that Travelers should prevail as a matter of law.

After hearing, the district court on June 3, 1996, rendered its Memorandum and Order determining that there were no material issues of fact in dispute, and that Travelers was entitled to judgment as a matter of law, and entered judgment on June 3, 1996, as to all claims. Reidy filed a timely appeal from the judgment.

Reidy, his wife, Toni E. Reidy, and his children, Terrence M. Reidy, John A. Reidy, Brian J. Reidy, and George M. Reidy, filed a notice of appeal to the United States Court of Appeals for the First Circuit on June 25, 1996. The Court of Appeals entered judgment on February 13, 1996, affirming the district court decision, but on different grounds. A petition for rehearing was filed and denied on March 3, 1997.

Factual Background

Reidy began his employment with Travelers in August 1967, as an outside claim representative. As a result of his professional competence and performance, Reidy was promoted to Assistant Supervisor of the P.I.P. Unit in 1971. As a result of his professional competence and performance, Reidy was promoted to Supervisor and Unit Head of the Subrogation Unit in 1973. Reidy always received above-average annual appraisals.

While Reidy was Head of the Subrogation Department from 1973 until 1985, the department never missed a year end major goal, and the Subrogation Unit always had excellent results. Reidy went away on vacation and returned in late August 1987, at which time he was relieved of his duties as Unit Head Supervisor of the Subrogation Department, without any valid reason, and was assigned to the Auto Damage Unit performing the function of a claims representative, a demotion but one without loss of title or salary.

From the beginning of his transfer to the Auto Damage Unit, Reidy received a full case load, even though in his eighteen (18) years he never directly handled that type of claim.

Although Reidy requested help, he received minimal help from his immediate supervisor, Terry Stachura ("Stachura"), and rarely received any advise from Stachura regarding auto damage claim handling and the mechanics of handling the files.

When Reidy was on vacation or was out sick, no one, including Stachura, ever did any more than minimal work on his files, if that. During the period that Reidy was assigned to the Auto Damage Unit, he received approximately 50-60 telephone calls each day, and of those calls, 5-10 calls would be in reference to files in the Subrogation Unit which Reidy formally handled. Although Reidy requested that the problems regarding the responsibility codes be changed, no changes were ever made, and the problems and situations were never rectified.

Reidy contends that Travelers intentionally and systematically caused Reidy to have excessive case loads, under staffing, and a stressful atmosphere to force Reidy out. Reidy's work load was so heavy and demanding, that he could easily be subjected to complaints about the quality of his work. Reidy was working late hours in the office and was also forced to take work home in order to complete the work. Reidy had a work load that was three and one half times the recommended high guidelines for Travelers.

Reidy always performed his work in a fully competent and professional manner, and if there were any problems concerning his work performance, it was not as a result of his failure to perform to his best ability, but it was rather the fact that the work load was so heavy, that no one could perform it successfully. Reidy contends that Travelers is engaged in a pattern or practice of discriminating against older workers by increasing their work load beyond their ability to perform it successfully, and that there were a number of employees over the age of 40 who were given excessive case loads and excessive work loads for the purpose of forcing them to quit. Many of these older Travelers' employees were unable to

handle the execessive work loads and were forced out.

Smith changed Reidy's yearly appraisals after they were approved and signed by all the parties. As a result, without Reidy's knowledge, the yearly appraisals were lowered by Smith, and Reidy received a lower salaray than he was enttitled to over the years. This caused Reidy to lose thousands of dollars over the years.

Although Reidy requested copies of his yearly appraisals when they were made by Smith, Smith did not provide them, except for a few, and this allowed Smith to submit false lowered appraisals to Travelers. Reidy did not know that Smith was altering these yearly appraisals until the lawsuit.

As a result of the excessive work load and the constant harassment, Reidy took a medical leave of absence on or about September 6, 1988.

In May 1989, on two occasions, Reidy spoke with Joan Lawson ("Lawson"), a benefits coordinator for Travelers in Hartford, Connecticut She outlined to him the guidelines on how he was to proceed with alternative employment. Reidy provided her with his work history and medical background. Reidy was advised by her that "substantial" means that he could not earn in a year more than the money he received from Travelers in disability payments. Lawson also indicated to Reidy that if he earned a little bit more than that, that still would not be a problem.

On or about August 1, 1989, Reidy began work for A&S Delivery as a courier at $7.25 per hour. Reidy fully informed the Travelers representatives that he had started work at A&S Delivery, and also indicated that he was receiving income from that work.

On or about September 15, 1989, Reidy began treatment with a Doctor Roy Parenty ("Parenty"), a psychiatrist employed by Travelers. Dr. Parenty placed Reidy on certain medication on his very first visit, including Prozac and Pamelor. Initially, Reidy felt better from the medication, but the medication had severe side effects, including falling

asleep at the wheel, causing two accidents, and numerous near misses and near accidents. Prior to his taking the medication prescribed by Dr. Parenty, Reidy had not had an automobile accident in approximately 25 years. As a result of the Prozac, Reidy also began to have suicidal thoughts and tendencies with erratic and violent behavior. The Pamelor made Reidy very irritable and tense.

Although Reidy had been treating with Dr. Parenty for almost a year, and although he was provided with Dr. Parenty's services by Travelers, Travelers denied that they were any way involved with having Dr. Parenty treat Reidy. Reidy did not pay any of the bills associated with the treatment by Dr. Parenty, but in fact, Travelers paid for all of the medical bills regarding the treatment by Dr. Parenty. Dr. Parenty also advised Reidy that if Reidy stopped treatment with him, that the disability payment checks that he was receiving from Travelers would be discontinued.

As a result of the stress at work, Reidy developed a handicap, mainly the inability to work in a stressful environment. Reidy required a reasonable accommodation in order to return to work. Reidy was prepared to return to work at Travelers, if Travelers provided a reasonable accommodation. Travelers refused to provide Reidy a reasonable accommodation. Although Reidy never received any formal notification, he contends that he was terminated, effective June 1, 1991.

Reidy contends that there are implied or expressed policies, procedures, or practices, that employees of Travelers will be treated fairly, and that they will not be terminated, except for good reasons. Reidy contends that he was terminated in violation of those implied or expressed terms. Reidy was able to perform the terms and conditions of his employment provided that he was given a reasonable accommodation for his handicaps, but Travelers breached the terms of that employment contract by discharging Reidy and preventing him from performing the terms and conditions of his

employment contract with Travelers. At the time he went out on the medical leave of absence, his salary was $33,200.00 per year plus other employment benefits.

At the time of his discharge on or about June 1, 1991, Reidy was receiving $319.23 per week in disability benefits. These benefits ceased on June 1, 1991.

Reidy is more than forty years of age. His date of birth is July 20, 1941.

When Reidy was demoted, he was replaced by Kenneth Quick, a younger person under forty, and that when Reidy went out on disability, he was replaced by Charles Puzak, a younger person under forty, and that Travelers discriminated against Reidy in the terms and conditions of his employment because of Reidy's age.

Reidy further contends that as a result of the wrongful conduct committed against him by Travelers, that his wife, Toni E. Reidy ("Toni"), and his children, Terrance M. Reidy ("Terrance"), John A. Reidy ("John"), Brian J. Reidy ("Brian"), and George M. Reidy ("George"), suffered a loss of consortium and a loss of nurture respectively.

Travelers asserts that Reidy was incapable of performing the essential functions of his job even with a reasonable accommodation, and that Reidy was not qualified to fill any position within Travelers. Reidy categorically denies that he was incapable of performing in any capacity and further states that he was capable of performing in a light duty capacity.

Furthermore, under their own written policies, Travelers was required to offer Reidy part time work as therapy as needed, and Travelers own doctor, Dr. Felsenfeld, was working with Reidy's personal physician to find a suitable position for Reidy, and so stated this in a written memorandum dated November 19, 1990. "Reidy should return to light duty . . . that a return to work was needed even if a suitable position had to be created for Mr. Reidy . . . we have to be flexible . . . ". Dr. Felsenfeld, Travelers' doctor, also stated that the job for Mr. Reidy "had to be approved by Dr. Moretti" (Reidy's

personal physician).

Travelers failed and refused to provide Reidy this reasonable accommodation, but instead, offered Reidy a job it knew he could not do, a full-time position in the subrogation unit with a 75% workload, the position, which caused his mental impairment. Furthermore, when Reidy went out on disability in September 1988, he was working in the auto damage unit, not the subrogation unit. Travelers refused to provide Reidy any reasonable accommodation, refused to respond to his numerous oral and written requests, and ecen refused to discuss this with Reidy or his doctor, or even to follow Reidy's suggestion about getting an independent medical examination to determine Reidy's functional ability.

Travelers asserts that Reidy's employment was terminated because he was working elsewhere as a courier, and that they would provide a position for him, and that if he did not accept the position offered, that Travelers would terminate his position, which they did.

Reidy was doing everything he could to get back into the work force in order to eventually return to work at Travelers. Reidy followed the guidelines set by Travelers. It was Travelers agents who violated Travelers policies and guidelines, not Reidy, and improperly terminated Reidy's disability benefits. Reidy was told that he would receive yearly inquiries from Travelers regarding his earnings and cost of living factors after five years. Going to work as a courier was part of his therapy in order to get him back working and eventually to return him to work at Travelers. If Travelers had provided a reasonable accommodation, followed their own written policies, and followed their own doctor's advise, Reidy would have been able to return to work at Travelers.

On August 3, 1990, Reidy spoke with Jean Erickson (Erickson"), Worcester Personnel Director for Travelers, and Erickson was advised directly on the telephone regarding the particulars of Reidy's work at A&S Delivery. Erickson was to do research on Social Security benefits for Reidy, and

Erickson told Reidy that she would write to him about Social Security and the mechanics for applying for total disability benefits, which would do away with Reidy's yearly medical examinations.

On November 5, 1990, Dr. Felsenfeld sent a letter to Reidy advising him that he was expected to return to work on November 19, 1990, to perform light duty work per the letter of Dr. Moretti. On November 12, 1990, Reidy had a discussion with Dr. Moretti, and Reidy was advised that he could do less stressful work similar to the delivery or courier work he was performing for A&S Delivery. Dr. Felsenfeld, Travelers doctor, was to recommend a less stressful job in order to get Reidy back to work at Travelers. It was anticipated that Reidy would eventually be able to return fulltime to his old job. It was Dr. Moretti's opinion that Reidy could return to work in a less stressful position. Dr. Moretti also stated that he definitely did not want Reidy to return to his former very stressful work in the beginning, and Dr. Moretti so informed Dr. Felsenfeld, Travelers' in-house doctor.

In a memorandum from Travelers' Medical and Law Department dated November 19, 1990, and November 20, 1990, Doctor Felsenfeld stated, "a return to work was needed even if a suitable position had to be created for Mr. Reidy . . . some simple type of work that needed to be done such as distributing claim files. This would have been a reasonable accommodation, but Travelers never offered any reasonable accommodation for Reidy, other than going back to the job he got sick on."

Reidy informed Travelers, through Dr. Parenty, Erickson, Dr. Felsenfeld, and others that he was working as a courier. It is clear by their own documents that Travelers was aware of this fact as early as November 19, 1990. Travelers also knew prior to this because of Reidy's many conversatins with Travelers' Dr. Parenty.

On February 14, 1991, Reidy received a letter from Erickson stating recently that they learned that Reidy was

working, and therefore effective March 4, 1991, that Reidy's disability benefits would be discontinued, he would have four weeks of unpaid leave. The letter sent by Erickson was untrue, since Travelers knew that Reidy had been working, and knew this some 18 months earlier. Reidy was working as a courier as part of his therapy in order to get well enough to return to his regular job at Travelers or some other comparable job.

On March 7, 1991, Reidy had a three way telephone conversation with Erickson, and Charles R. Shaw ("Shaw"), at the home office Corporate Benefits regarding his disability benefits. They continued to say that they just found out Reidy was working. Mr. Shaw chided Reidy on several occasions, telling him that Reidy did not want to return to work. Reidy stated that he did want to return to work, but medically, he could not return to work in the same stressful environment. Reidy told Mr. Shaw that he could return to work. Mr. Shaw then said he would have Erickson send a letter outlining Reidy's return to work, and that if Reidy did not return to work, he would be terminated.

Although Travelers now makes the claim that Reidy was not entitled to be working while receiving disability benefits, this was false. When Travelers made any overpayment of anything, no matter how small or trivial, Travelers would always request and receive the money back. Travelers never asked to receive any reimbursement for any of the disability benefits paid to Reidy. Reidy received disability benefits from September 1988 through March 25, 1991.

Although Reidy requested from Travelers that he be reemployed in a less stressful position, Travelers refused to provide any accommodation to Reidy, refused to follow their own written policies, refused to follow their doctor's advice, and refused to allow Reidy to return in any capacity, other than as a claim representative in the subrogation unit, the position which caused him to become disabled in the first place. Reidy was in the auto damage unit, not the subroga-

tion unit, when he went out on disability in September 1988.

Although Travelers claims that Reidy was terminated on June 1, 1991, Travelers in fact, never gave Reidy any notice under COBRA, nor did Travelers ever provide any COBRA benefits to Reidy.

Erickson denied knowing that Reidy was working when in fact she knew that Reidy was working. Reidy received workers' compensation benefits as a result of the job stress.

According to the Decision of the Department of Industrial Accidents, Reidy sustained a personal injury arising out of and in the course of his employment and that the work stress at Travelers was extreme and was the cause of Reidy's disability.

After ten years with Travelers, an employee becomes tenured and vested, and you cannot be terminated without good cause as outlined in Travelers written policies. No one was terminated at Travelers after ten years unless there was a good cause. Furthermore, when someone was terminated, they would receive severance pay as outlined in their written policies. Reidy was never offered or did he receive severance pay.

Reidy did not refuse to return to work; Travelers refused to provide a job Reidy could reasonably perform given his mental impairment. Reidy was capable of performing work from August 1989 to September 1991, but Travelers refused to allow him to return to a suitable position. There were jobs available at Travelers that Reidy could have done, but Travelers never offered Reidy any of those jobs. The reason Reidy could not work after September 1991, was that his condition had deteriorated because he was terminated without any good reason, and Travelers refused to provide a job for him that he could have performed. The termination was devastating to Reidy, and it was Travelers that caused Reidy to become totally disabled to the present time. Reidy became totally disabled because of what Travelers did to him and what they failed to do, namely, not providing him with a job

that he could have performed.

The actions of Travelers caused Reidy to become disabled. If Travelers had given Reidy the support he needed, followed their own written policies, followed the advice of Travelers' own doctor, Reidy still would be working at Travelers. Reidy was coming along well and working well at the courier job, until Travelers fired him.

The Opinion from the Court of Appeals

Since this case was in the federal court on the basis of diversity jurisdiction, the court had to apply Massachusetts law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Rule 56(c) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974) provides that a Motion for Summary Judgment shall only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law." A party moving for Summary Judgment has two burdens, (1) the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings, and (2) that he is entitled to Judgment as a matter of law. If the moving party fails to meet either burden, summary judgment must be denied. *Smith v. Massimiano*, 414 Mass. 81, 85-86 (1993). See *Foley v. Matulewicz*, 17 Mass. App. Ct. 1004 (1984); *Attorney General v. Bailey*, 386 Mass. 367 (1982). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the Motion for Summary Judgment. See *Hub Associates v. Goode*, 357 Mass. 449, 451 (1970). The Court may not weigh the evidence or assess credibility, or find facts. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985).

Contrary to Massachusetts law, the Court of Appeals found facts and drew inferences in favor of the moving party and

incorrectly interpreted Massachusetts law.

The Court of Appeals held that Reidy "adduced no competent evidence" that he could not be terminated from his employment at Travelers without good cause.

Reidy, as a supervisor at Travelers for many years, was told and instructed by his superiors that an employee could not be terminated except for good cause.

Under Massachusetts law, one does not have to look just at a written personnel manual to determine what rights an employee may have. The employment relationship may involve written arrangements, oral arrangements, or arrangements that are implied by the actions or conduct of the parties. See *O'Brien v. New England Telephone and Telegraph Co.*, 422 Mass. 686, 691 (1996).

Reidy stated that, "After ten years with Travelers you become tenured, and you cannot be terminated without good cause. I know this because I was a supervisor. No one was terminated at Traveler's after ten years unless there was a good cause. Furthermore, when someone was terminated they could receive severance pay."

The Court of Appeals found as a fact that "there is no evidence to confirm" that the Massachusetts Commission Against Discrimination ("MCAD" the state fair employment practice agency) received a formal complaint. Again, the Court of Appeals found the facts and reasonable inferences in favor of the moving party and has misconstrued Massachusetts law.

The decision states that, "Reidy contends that his counsel mailed a formal complaint to the MCAD on August 30, 1991, but there is no evidence to confirm its receipt by the MCAD." Again, since this is a motion for summary judgment, all facts and reasonable inferences must be found in favor of the non-moving party. By letter dated August 30, 1991, Reidy, through counsel, mailed a copy of a notarized charge of discrimination outlining all of the discriminatory allegations. The MCAD sent back a form letter on September 20, 1991,

acknowledging receipt of the charge. That first form letter from the MCAD was received on September 24, 1991. Since Reidy had filed no letter outlining allegations of discrimination, and since the only statement outlining the statement of discrimination was stated on the notarized charge of discrimination, the only reasonable inference to be drawn is that the MCAD received the charge of discrimination on or about August 30, 1991.

A person who sends a charge of discrimination with the MCAD has the right to immediately withdraw the charge in order to file a private lawsuit in accordance with General Laws Chapter 151B, § 9. That is precisely what Reidy did through his counsel by letter dated September 26, 1991. Since that September 26, 1991, letter was sent by first-class mail and was not returned, the inference that must be drawn is that the MCAD received the letter. Following that September 26, 1991, letter requesting a withdrawal so that a private lawsuit could be brought, an exact duplicate of the letter dated September 20, 1991, from the MCAD was received on October 10, 1991.

The fact is that Reidy never wrote a letter to the MCAD, let alone a letter "describing Travelers' alleged discriminatory conduct." The only document ever sent to the MCAD "describing Travelers' discriminatory conduct" was the formal charge signed by Reidy and notarized and mailed by first class mail by Reidy's counsel.

Since the MCAD had never received "a letter from Reidy" the only reasonable inference that can be drawn is that a formal MCAD charge was received by the MCAD and either lost by them or not accepted by them. Since Reidy had already decided to pursue his claims of discrimination under General Laws c. 151B, § 9, the form correspondence received from the MCAD was of little or no concern, since the intent was to file the timely charge with the MCAD as required by statute and then to immediately file a lawsuit in court.

The provisions of General Laws Chapter 151B "shall be

construed liberally." General Laws Chapter 151B, § 9. "There are two largely independent avenues for redress of violation of the anti-discrimination laws of the Commonwealth, one through MCAD (G. L. c. 151B, §§ 5-6) and the other in the courts G.L. c. 151B, § 9) . . . The statutory scheme rejects the administrative law principles of primary jurisdiction and exhaustion of administrative remedies. The filing of a § 9 court action requires the MCAD to dismiss without prejudice any complaint pending before it and bars the plaintiff from pursuing the matter subsequently before the MCAD. G.L.c 151B, § 9." *Christo v. Edward G. Boyle Insurance Agency Inc.*, 402 Mass. 815, 817 (1988).

Reidy should not suffer because agents of the MCAD either lost or misplaced or the formal charge of discrimination filed with the MCAD or refused to accept it on or about August 30, 1991. Under Massachusetts law "proper mailing of a letter is 'prima facie evidence' of its receipt, which means that from proof of mailing alone the jury may but are not required to find receipt." *Commonwealth v. Crosscup*, 369 Mass. 228, 242 (1975). In fact, the district court held that "this Court is required to draw all reasonable inferences in favor of the plaintiff and therefore assumes that he did indeed file his charge with the MCAD on August 30, 1991." Contrary to the district court holding the Court of Appeals found as a fact that there was no receipt of a formal charge by the MCAD.

The facts in this case are clearly distinguishable from *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021 (1996). In *Arkwright* no timely charge was filed. In Reidy's case a timely charge was mailed to the MCAD but was either lost, misplaced, or not accepted by the MCAD. Arkwright supports Reidy's position, because in Reidy's case, the MCAD was at fault for losing, misplacing, or refusing "to accept a properly presented timely complaint." Id. at 1022. The undisputed and uncontroverted evidence is that Reidy did present a timely complaint to the MCAD. That is

Reidy's only obligation under Massachusetts law. The fact that there is no evidence "to confirm its receipt by the MCAD" is irrelevant under Massachusetts law. If the MCAD refused "to accept a properly presented timely complaint," that would not bar a claim under General Laws c. 151B, § 9. *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 1022 (1996).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT "THE DISTRICT COURT LACKED JURISDICTION OVER STATE EMPLOYMENT-BASED DISCRIMINATION CLAIMS" IN THEIR FINDING OF FACT THAT NO FORMAL COMPLAINT WAS RECEIVED BY THE STATE FAIR EMPLOYMENT AGENCY.

For purposes of summary judgment, all facts and reasonable inferences must be decided in favor of the non-moving party.

Reidy's counsel mailed a formal notarized charge of discrimination dated August 30, 1991, with the MCAD

The MCAD's form letter dated September 20, 1991, confirms that Reidy's formal charge was sent and received by the MCAD within six months of the discriminatory act. That first form letter from the MCAD was received on September 24, 1991. Since Reidy had filed no letter outlining allegations of discrimination, and since the only statement outlining the statement of discrimination was stated on the notarized charge of discrimination, the only reasonable inference to be drawn is that the MCAD received the charge of discrimination mailed on or about August 30, 1991.

A person who files a charge of discrimination with the MCAD has the right to immediately withdraw the charge in order to file a private lawsuit in accordance with General

Laws Chapter 151B, § 9. That is precisely what Reidy did through his counsel by letter dated September 26, 1991. Since that September 26, 1991, letter was sent by first-class mail and was not returned, the inference that must be drawn is that the MCAD received the letter. Following that September 26, 1991, letter requesting a withdrawal so that a private lawsuit could be brought, an exact duplicate of the letter dated September 20, 1991, from the MCAD was received on October 10, 1991.

The fact is that Reidy never wrote a letter to the MCAD, let alone a letter "describing Travelers' alleged discriminatory conduct." The only document ever sent to the MCAD "describing Travelers' discriminatory conduct" was the formal charge signed by Reidy and notarized and mailed by first class mail by Reidy's counsel.

Since Reidy had already decided to pursue his claims of discrimination under General Laws c. 151B, § 9, the form correspondence received from the MCAD was of little or no concern, since the intent was to file the timely charge with the MCAD as required statute and then to immediately file a lawsuit in court.

Reidy should not suffer because agents of the MCAD either lost or misplaced the formal charge of discrimination filed with the MCAD on or about August 30, 1991. This is especially so because the defendant in this case received notice of a complaint within six months of Reidy's discharge from Travelers. Travelers did not receive a stale claim, nor was Travelers prejudiced in any way in preparing their defense.

The facts in this case are clearly distinguishable from *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1012 (1996). In *Arkwright* no timely charge was sent to the MCAD. In Reidy's case a timely charge was sent but presumably lost or not accepted by the MCAD. Arkwright supports Reidy's position, because in Reidy's case, the MCAD was at fault for losing or refusing "to accept a properly presented timely complaint." Id. at 1022.

II. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO REIDY'S STATE CLAIMS FOR BREACH OF CONTRACT

Since this case is to be decided under Massachusetts law, and not Federal law, the appropriate case is not *Pearson v. John Hancock Life Ins. Co.*, 979 F.2d 254, 256-57 (First Cir. 1992), but rather Massachusetts law. In Massachusetts, one does not have to look just at a written personnel manual to determine what rights an employee may have. The employment relationship may involve written arrangements, oral arrangements, or arrangements that are implied by the actions or conduct of the parties. See *O'Brien v. New England Telephone and Telegraph Co.*, 422 Mass. 686, 691 (1996).

The District Court Judge made findings of material facts that are disputed facts:

Reidy contends that the relationship with Smith deteriorated, not because of any alleged "poor performance by Reidy" as contained in the District Court's decision, but in fact because of Smith's harassment. Reidy always received above average appraisals, even when he was being harassed.

Honore knew that Reidy's unit was severely understaffed and that Reidy was being severely overworked. Reidy was not told about any of his alleged problems until after Reidy requested the information and only after Reidy had already been transferred to the auto damage unit.

When Travelers violated their own written policies, failed to follow their doctor's advice, and failed to provide Reidy a reasonable accommodation, Reidy asked for an additional extension until September 1, 1991, to make his decision to return. Travelers never even responded to that request.

The finding "of an implied employment contract" was not just based on "his tenure with Travelers," it was based on the totality of circumstances, including policies and procedures in the workplace.

Reidy disputes that "he allowed the statute of limitations

to run on several files." This is not supported by the record.

In Massachusetts, an employment agreement may be express or implied. See *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 670 (1981); *Carnig v. Carr*, 167 Mass. 544, 547 (1897); *Daniell v. Boston Maine R.R.*,187 Mass. 337 (1903); *Kirkley v. F.H. Roberts Co.*, 268 Mass. 246 (1929): *Carnig v. Carr*, 167 Mass. 544, 547 (1897).

In determining the existence of a contract, the jury must consider "all attendant conditions surrounding the agreement as well as upon its terms, when the latter are not specific and clear." *Kravitz v. Merchants Distributors, Inc.*, 387 Mass. 457, 460 (1982); *Mahoney v. Hildreth Rogers Co.*, 332 Mass. 496, 498 (1955); *Carnig v. Carr, supra; Fenton v. Federal Street Bldg. Trust*, 310 Mass 610 (1942). When considering the totality of the parties' relationship, an employee's longevity of service may create an implied contract that insulates the employee from arbitrary discharge. The existence of a contract is a question for the fact-finder. *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1 (1908).

Employee manuals, handbooks, and company policies and regulations may constitute implied or express terms of a contract. See *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413 (1988); *Garrity v. Valley View Nursing Home, Ind.*, 10 Mass. App. Ct. 822 (1980); *Goldhor v. Hampshire College*, 25 Mass. App. Ct. 716 (1988); *Pavadore v. School Committee of Canton*, 19 Mass. App. Ct. 943 (1985) (See cases from other jurisdictions: *Toussaint v. Blue Cross Blue Shield*, 292 NW2d 880 (1980); *Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914 (6th Cir. 1984); *Pine River State Bank v. Mettille*, 333 NW2d 622 (1983); *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A2d 1257 (1985); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 378 NW2d 558 (1985); *Wilkerson v. Wells Fargo Bank*, 212 CalApp3d 1217, 4 IER Cases (BNA) 831 (Col. 1989). Provisions of an employee manual or company policies may become part of the contract either by express oral agreement or by reason of an employ-

ee's legitimate expectation.

Furthermore, an employee's continuation to work may provide both assent to and consideration for the employer's promises embodied in the manual and company policies and practices. See *Smith v. Graham Refrigeration Products Co.*, Inc., 333 Mass. 181, 186 (1955).

Here, Reidy worked for Travelers for more than 20 years as a good, loyal, dedicated, and faithful employee. Reidy was aware that Travelers had personnel policies that he would be treated fairly. There was an established policy at Travelers, known to Reidy and relied upon by him, that an employee such as himself, who had performed services as a good and faithful employee, would be guaranteed fair treatment and would not be discharged unfairly or in bad faith. Because of his more than twenty years dealing with Travelers' policies, he reasonably expected that he would not be treated in an arbitrary manner. He was specifically instructed that the employees he supervised could not be discharged, except for good cause. See *O'Brien v. New England Telephone Telegraph Co.*, 422 Mass. 686, 691-694 (1996).

Reidy has set forth sufficient facts, if believed, that he had an employment contract that was breached by Travelers. Summary judgment should not have been granted on the breach of contract claim.

III. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO REIDY'S STATE CLAIMS FOR AGE AND HANDICAP DISCRIMINATION

Reidy has brought state claims for age and handicap discrimination under General Laws c. 151B and under General Laws c. 93, §103.

The standard for granting summary judgment under state law in discrimination cases differs from the federal standard. *Blare v. Husky Molding Systems, Inc.*, 419 Mass. 437 (1995). Compare to *Woods v. Friction Materials, Inc.*, 30 F3d 255 (1994).

When considering a state claim, a federal court must apply the law of the state in which it sits. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In interpreting General Laws c. 151B, interpretations of analogous federal statutes by federal courts are not binding on Massachusetts courts interpreting its own statute. *College-Town Division of Interco., Inc. v. MCAD*, 400 Mass. 156, 163-164 (1987). The Supreme Judicial Court follows the three-part analysis in *McDonnell Douglas - Burdine*, but not as formulated by the First Circuit. See *Wheelock College v. MCAD*, 371 Mass. 130, 136-139 (1976); *Lewis v. Area II Homecare for Senior Citizens, Inc.*, 397 Mass. 761, 765-767 (1986). If Reidy's age and/or handicap made a difference, that is sufficient under Massachusetts law.

Therefore, in considering Reidy's General Laws c. 151B discrimination claim, this court must apply the law as expressed by the Supreme Judicial Court.

In alleging discrimination in violation of General Laws. c. 151B, the initial burden of establishing a prima facie case of discrimination rests with the plaintiff. *Wheelock College v. MCAD*, *supra* at 135 n. 5. Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 136. "Articulating" a legitimate, nondiscriminatory reason under state law "requires the employer to produce not only evidence of the reason for its action but also underlying facts in support of that reason." *Id.* (emphasis supplied), *Smith College v. MCAD*, 376 Mass. 221, 229 (1978); *Lewis v. Area II Homecare for Senior Citizens, Inc.*, *supra* at 765; *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559, 566 (1981). An employer must not only give a lawful reason for its employment decision but must also produce credible evidence to show that the reason proffered was the real reason. *Wheelock College v. MCAD, supra* at 138 (emphasis supplied).

If the employer satisfies this burden, the plaintiff has an

opportunity to show that the employer's proffered nondiscriminatory reason was a pretext. The plaintiff may satisfy this burden by showing that the proffered reason "has no reasonable support in the evidence or is wholly disbelieved (and hence is transparently pretextual)." *Wheelock College v. MCAD, supra* at 138. A plaintiff may show that the defendant's reason is pretextual by showing that it is fabricated. *Trustees of Forbes Library v. Labor Relations Commission, supra* at 566-67 n. 5. Accordingly, Reidy may prevail by means of indirect proof that Travelers' reasons for the adverse action are pretextual without presenting evidence specifically relating to his protected categories (age, handicap).

Blare, supra, makes it clear that Massachusetts has departed from the First Circuit's pretext plus standard. As the Supreme Judicial Court declared in *Flesner*, "[m]uch depends on the credibility of witnesses testifying as to their own states of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." *Flesner* at 809.

"...(O)nce a plaintiff has established a prima facie case and further shows either that the employer's articulated reasons are a pretext or by direct evidence that the actual motivation was discrimination, the plaintiff is entitled to recovery for illegal discrimination under G.L. c. 151B . . . The ultimate issue of discrimination, raised by the plaintiff's and defendant's conflicting evidence as to the defendant's motive is not for a court to decide on the basis of affidavits, but is for the fact finder after weighing the circumstantial evidence and assessing the credibility of the witnesses." *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 444-445 (1995).

If the plaintiff produces evidence of a prima facie case of employment discrimination, summary judgment should be denied. If the employer produces an explanation with evi-

dence of the reason for the decision, a plaintiff need only produce evidence that disputes the employer's explanation to survive summary judgment. The pretext only standard is an appropriate one given the realities of the workplace.

Applying these principles here, a jury could find the following facts and draw the following inferences:

Reidy was a handicapped person within the meaning of state law. He was also more than 40 years of age. He performed competent work over the years for Travelers in a variety of positions. He was overworked to the point he had a "nervous breakdown." He was put out on disability leave. While out on disability, he started to recover sufficiently to take a position as a courier for another company.

Reidy was given permission to work as a courier for another company while he was receiving disability payments from Travelers. This courier work was part of Reidy's therapy.

Traveler's used that as an excuse to terminate Reidy's employment. Travelers offer to bring Reidy back to work in the position that caused him to become mentally disabled or be terminated was a disingenuous offer. Travelers knew Reidy could not come back to that position.

Travelers had other available positions Reidy could have performed but did not offer him one of those positions because they did not want him to come back to work, but merely wanted to find an excuse to terminate his employment.

When Reidy could not come back to work in the only position offered to him, Travelers terminated his employment and terminated his disability payments. Those actions caused Reidy to become even more depressed and led to a total mental breakdown, thereby making him totally disabled from any work.

Travelers, having caused Reidy to become totally disabled, now argues that Reidy is not a qualified handicapped person. An employer who causes a handicapped person to become totally disabled by failing and refusing to provide a reason-

able accommodation should not be allowed to escape liability.

Reidy mailed a timely charge of discrimination to the Massachusetts Commission Against Discrimination ("MCAD") and should not be penalized for errors caused by that agency. When the request was made to withdraw the complaint from the MCAD, the fact that was not done should not cause Reidy to lose his right to bring his claim under General Laws c. 151B § 9. Travelers suffered no prejudice. Travelers will have the opportunity to defend the claim on the merits. By depriving Reidy of his day in court because of an error made by the MCAD is to put form before substance.

In enacting the handicap provisions of General Laws c. 151B, the state legislature believed that handicapped persons have been subjected to unequal treatment based on characteristics that are beyond their control and resulting from stereotypical assumptions that do not truly indicate ability to participate in and contribute to society. *Villecco v. General Electric Company*, 8 MDLR 1010, 1019-20 (1986).

The determination as to whether or not Reidy is a handicapped person is a question of fact. Travelers was required to determine whether or not Reidy could perform any job for them with a reasonable accommodation.

The employer must make an effort to determine the appropriate accommodation. The focus of this effort is on what accommodations will be effective enough to overcome the barriers to the individual's equal employment opportunities. *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985). It is the employer's, not the employee's, duty to suggest methods of reasonable accommodation. *Bultemeyer v. Ft. Wayne Community Schools*, 100 F.3d 1281, 6 AD (BNA) Cases 67 (7th Cir. 1996); *Crane v. Lewis*, 551 F. Supp. 27, 32 (D.D.C. 1982); *Butler v. Department of the Navy*, 595 F. Supp. 1063, 1067-68 (D. Md. 1984).

The burden of persuasion is on the employer to prove that an accommodation is not possible or would impose an undue hardship on the operation of its business. *Prewitt v. United*

States Postal Service, 662 F.2d 292, 308 (5th Cir. 1981).

Transferring a handicapped employee from one job to another for which he is qualified as a reasonable accommodation is permissible. General Laws c. 151B, § 4(16), recognizes that transfer to a comparable job is a reasonable accommodation. Although an employer is not required to create a new position or to bump another employee from his job to give it to the handicapped employee, an employer cannot deprive a qualified handicapped employee, as a reasonable accommodation, alternative employment opportunities available under the employer's existing policies. Accordingly, if an employee is unable to perform the essential functions of a job because of his impairment, he may transfer to a different vacant position for which he is qualified as a reasonable accommodation. Travelers' own policy, that they did not follow in Reidy's case, should have allowed Reidy to return to work gradually on a part-time basis.

Furthermore, the district court erred in holding that to prevail in a handicap discrimination, the employee had to establish that the action was taken solely because of his handicap. This is not the law. It is enough if the employee's handicap made a difference. *McNely v. Ocala Star-Banner Corp.*, 6 AD (BNA) Cases 78 (11th Cir. 1996).

Reidy has met his burden of establishing a prima facie case and summary judgment should not have been granted.

IV. REIDY HAS SET FORTH SUFFICIENT FACTS TO ESTABLISH CLAIMS FOR LOSS OF CONSORTIUM AND LOSS OF NURTURE

Massachusetts recognizes causes of action for loss of consortium in favor of spouses, *Diaz v. Eli Lilly and Co.*, 364 Mass. 153 (1973), as well as for loss of nurture in favor of minors. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507 (1980). A claim for loss of consortium is the loss of the rights and duties of married life, including love, affection,

companionship, society, comfort and services. *Diaz v. Eli Lilly and Co., supra.* The loss of nurture concerns the parent and child relationship and the loss of emotional guidance, support, and nurture. *Ferriter v. Daniel O'Connell's Sons, Inc., supra.* These claims are considered derivative claims in the sense that they do not arise unless the impaired spouse or parent has sustained some legally cognizable injury; otherwise they are separate causes of action.

Nothing in General Laws c. 151B precludes causes of action for loss of consortium or nurture. These causes of action are existing legal remedies. Nothing in the provisions of General Laws c. 151B suggests that these causes of action have been eliminated. As the Supreme Judicial Court explained in *Comey v. Hill*, 387 Mass. 11, 20 (1982), repeal of the common law by implication of a statute is not to be inferred; rather legislative intent must be evident.

Legislative intent was evident with respect to industrial accidents remedied pursuant to the worker's compensation statute. General Laws c. 152, § 24. The worker's compensation statute seeks to remedy injuries suffered on the job. Section 24, therefore, precludes consortium claims stemming from an on-the-job injury to the impaired spouse that is cognizable under that statute. On the other hand, General Laws c. 151B seeks to remedy a different type of injury. It seeks to remedy unfair treatment. Accordingly, General Laws c. 152, §24 does not preclude these derivative claims. Cf., *Reese v. Sears, Roebuck Co.,* 107 Wash 2d 563, 731 P.2d 4973, 51 FEP (BNA) Cases 784, 788-89 (Wash. 1987).

To read the state fair employment law as limiting the legal remedies for loss of consortium and nurture would deny the breadth and comprehensive nature of this remedial statute. *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26, 247 NW2d 488, 47 FEP (BNA) Cases 1050 (Mich. 1988) (loss of consortium claim not precluded by state's civil rights act); *Milnikel v. Mercy-Memorial Med. Center*, 183 Mich. App. 221, 454 NW2d 132, 53 FEP (BNA) Cases 908 (Mich. App. Ct. 1989)

(loss of consortium claim not barred by state's handicap civil rights act). Reidy's wife and children may therefore assert claims for loss of consortium and nurture, respectively.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,
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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 96-1814

GEORGE M. REIDY, ET AL.,

Plaintiffs - Appellants

v.

THE TRAVELERS INSURANCE CO.,

Defendant - Appellee

JUDGMENT

Entered: February 13, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ WIILIAM H. NG

Clerk.

CC: Frederick T. Colder, Esq.
Jay M. Presser, Esq.

[Not For Publication]
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1814

GEORGE F. REIDY, ET AL.,

Plaintiffs, Appellants,

v.

TRAVELERS INSURANCE COMPANY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before

Cyr, Circuit Judge,

Coffin, Senior Circuit Judge,

and Lynch, Circuit Judge.

Frederick T. Golder, with whom Bernstein, Golder & Miller, P.A. was on brief for appellants.

Jay M. Presser, with whom Jeffrey C. Hummel and Skoler, Abbott & Presser, P.C. were on brief for appellee.

February 13, 1997

Per Curium. George Reidy challenges a summary judgment ruling dismissing his wrongful discharge claims against The Travelers Insurance Company ("Travelers") for whom Reidy worked for over twenty years. Although Travelers contends that Reidy proved incapable of performing his work as a claims representative despite a reasonable accommodation of his stress-related "disability," Reidy asserts that Travelers' justification was pretextual. We affirm the district court judgment.

The four-count complaint alleged (i) breach of the employment contract; (ii) employment discrimination based on age; (iii) and on handicap; and (iv) claims for loss of consortium and nurture by his spouse and children.[1] As concerns the claim for breach of contract, Reidy appears to have believed that his long tenure as an employee-at-will protected him from arbitrary termination, but he adduced no competent evidence, See Fed. R. Civ. P. 56(e), that Travelers gave him any such assurance. Instead, Reidy principally contends that the written employee manual constituted a binding employment "contract" barring arbitrary discharge even though it unambiguously provided that Travelers was "free to terminate your employment at any time, for any or for no reason, and with or without advance notice," and that "no Travelers' manager or other person at the company has the authority to make a commitment of guaranteed or continuing employment." (Emphasis added.) Nor does Reidy cite any other provision (e.g., minimum term of employment) which assured him protection from unilateral, unconditional termination. See e.g., Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 256-57 (1st Cir. 1992).

The age and handicap discrimination claims fare no better. Massachusetts courts have no jurisdiction over employment discrimination claims unless the plaintiff-employee has filed a formal complaint with the Massachusetts Commission Against

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[1] We review the summary judgment ruling de novo, viewing all evidence in the light most favorable to Reidy. Byrd v. Ronayne, 61 F.3d 1026, 1030 (1st Cir. 1995).

Discrimination ("MCAD") within six months of the alleged discriminatory act. See Mass. Gen. Laws ch. 151B, §§ 4(1.B), 4(16), 5, 9; Clarke v. Kentucky Fried Chicken of Calif., Inc., 57 F.3d 21, 23 (1st Cir. 1995); Andrews v. Arkwright Mut. Ins. Co., 673 N.E. 2d 40, 41 (Mass. 1996). Reidy contends that his counsel mailed a formal complaint to the MCAD on August 30, 1991, but there is no evidence to confirm its receipt by the MCAD. The official MCAD record itself reflects no formal complaint. Moreover, on September 20, the MCAD compliance officer wrote Reidy and confirmed the receipt of his letter describing Travelers' alleged discriminatory conduct, but advised that a formal complaint would still be necessary to initiate MCAD action. A copy of the MCAD letter was provided to Reidy's counsel as well.

Although the MCAD letter plainly placed both Reidy and counsel on notice that the MCAD had received a letter from Reidy, rather than any August 30 letter from Reidy's counsel enclosing a formal MCAD complaint, neither Reidy nor counsel followed up on this obvious discrepancy or on the formal advice contained in the letter from the MCAD compliance officer.[2] Accordingly, the district court lacked jurisdiction and the employment-based discrimination claims were properly dismissed.

Affirmed.

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[2] Thus, Reidy's insistence that the summary judgment ruling penalized him for MCAD's administrative incompetence lacks record support. Of course, if cognizable, such unsubstantiated "defenses" would all but eviscerate the exhaustion requirement.

Since Reidy no longer holds actionable employment discrimination claims against Travelers, the district court properly dismissed the related claims by the spouse and children as well. See Tauriac v. Polaroid Corp., 716 F. Supp. 672, 673 (D. Mass. 1989) (citing Mouradian v. General Elec. Co., 503 N.E. 2d 1318, 1321 (Mass. App. Ct.) (dismissing wife's consortium claim because husband had no viable employment discrimination claim), review denied, 507 N.E.2d 1056 (1987)); see also Mass. Gen. Laws ch. 152, § 24 (1990) (workers' compensation statute preempts consortium claims of spouse, children and parents); Hamilton v. Baystate Med. Educ. & Research Found., 866 F. Supp. 51, 57 (D. Mass. 1994), aff'd, 66 F.3d 306 (1st Cir. 1995); St. Germaine v. Pendergast, 584 N.E. 2d 611, 617-18 (Mass. 1992).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY, and GEORGE M. REIDY,

Plaintiff(s),

v.

CIVIL ACTION
NO. 91-40154-NMG

THE TRAVELERS INSURANCE CO.,

Defendant.

JUDGMENT

GORTON, D.J.

In accordance with this Court's Memorandum and Order issued on June 3, 1996, allowing the defendant's Motion for Summary Judgment, it is hereby ORDERED;

Judgment for the defendant.

BY THE COURT,

\s_____
Deborah F. Shattuck
Deputy Clerk in Charge

DATED: June 3, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY, and GEORGE M. REIDY,	)	
Plaintiffs,	)	
v.	)	Civil Action NO. 91-40154 NMG
THE TRAVELERS INSURANCE CO,,	)	
Defendant.	)	

MEMORANDUM AND ORDER

GORTON, J.

Pending before this Court is defendant's motion for summary judgment on all counts. For the reasons set forth below, the motion will be allowed.

I. BACKGROUND

This Court summarizes the evidence in the light most favorable to the plaintiffs and resolves in their favor all reasonable inferences that could be drawn from that evidence.

Plaintiff, George F. Reidy ("Reidy"), was born on July 20, 1941. In August, 1967, he began working for defendant, Travelers Insurance Co. ("Travelers"), as an outside claims representative. He was soon promoted to assistant supervisor of the Personal Injury Payments Unit and placed under the direction of James Smith.

In 1973, as a result of his strong work performance, Reidy was promoted to unit head/supervisor of the Subrogation Unit and con-

tinued to report to Smith. Beginning in the mid-1970s, the relationship between Reidy and Smith deteriorated, based in part on Smith's allegations of poor work performance by Reidy. Although Reidy does not remember specific details, he admits that Smith may have questioned him about not working enough hours, taking extended coffee breaks and excessive socializing while on company time. Plaintiffs' Local Rule 56.1 Statement at 4. In 1978, Smith threatened to place Reidy on probation but dropped his threat when Reidy indicated that he would pursue legal action.

In 1983, Travelers consolidated its Worcester and Springfield offices and Reidy began to experience a substantial increase in his workload. It was around this time that Reidy began demonstrating the first signs of illness, including sleeping difficulties, depression and memory loss.

In the fall of 1985, Smith left the company and was replaced by John Honore. Reidy and Honore started out with a good working relationship. Reidy mentioned to Honore some of the problems that he saw within the unit, such as understaffing, large caseloads and computer problems. When Honore did not take any action to correct these problems, Reidy began to feel "that Honore might be out to get him" and "that Honore was perpetuating the treatment that Smith had started." Plaintiffs' Local Rule 56.1 Statement at 10. Reidy alleges that "Honore would have let the entire unit fail in order to establish a basis for discharging Reidy." Id. Reidy also alleges that age was a factor in Honore's treatment of him because Reidy saw that several older employees "had been forced to retire due to the Company's age discrimination and excessive demands." Id. Although Reidy continued to receive good job evaluations, he felt that these evaluations were "part of [a] smoke screen" so that Reidy would not realize that Honore was planning "to lower the boom" on him. Id.; Reidy Deposition, Vol. II at 100.

At some point, Honore reviewed Reidy's files and noticed that Reidy had allowed the statute of limitations to run on some of his files. Honore also told Reidy that he thought Reidy was taking

extended lunches and coffee breaks and making too many personal phone calls while at work. Reidy admits that these conversations took place, although he does not recall exactly when they occurred. Plaintiffs' Local Rule 56.1 Statement at 11. Reidy denies, however, that he committed the underlying behavior of which he was accused. Id.

In late August, 1987, plaintiff was reassigned to defendant's Auto Damage Unit to work as a claims representative. Technically, this was a demotion. Plaintiff however retained his title and pay level from the Subrogation Unit. Reidy was told that he had been transferred for several reasons, including tardiness, missing the statute of limitations on several workers' compensation cases, long lunches and coffee breaks, taking too much time reading the daily newspaper during work hours, failure to handle subrogation cases in a timely and diligent manner, and excessive personal phone calls. Memorandum from Honore to Reidy dated August 26, 1987.

In the Auto Damage Unit, plaintiff worked for Assistant Manager Harold Miller and Supervisor Terry Stachura. At first, Reidy did not believe that Miller and Stachura "were out to get him." Plaintiffs' Local Rule 56.1 Statement at 13. Eventually, however, Reidy began to notice that Miller and Stachura would not help him or cooperate with him. Id.; Reidy Deposition, Vol. II at 116.

In February, 1988, Reidy was told by Stachura that there was a problem with his backlog of files. Plaintiff subsequently met with Honore and Miller about his slowness in learning new materials. Plaintiff now alleges that this slowness of learning was one of the early signs of his health problems, although he was not aware of it at that time.

On June 1, 1988, plaintiff was informed by Honore that failure to improve his performance within 60 days would result in a final warning. That warning came on August 17, 1988, when plaintiff was told that failure to improve his performance within 60 days would result in termination.

Reidy took a vacation in late August, 1988. On August 30,

1988, Reidy was scheduled to report for work but did not. Instead, he called the following day and told defendant that he was not well and would not be in for the rest of the week. On September 6, 1988, Reidy called and reported that he still was not well. Plaintiff requested, and received, a medical leave of absence due to stress, which he claimed was a result of his excessive workload and the constant harassment he faced from defendant's agents.

Reidy also filed for and obtained disability payments pursuant to defendant's Sick Leave Plan. Under the terms of that Plan, an employee had to be "completely unable, because of injury or sickness, to be at work and perform the material duties of [his/her] occupation" in order to receive sick leave benefits. The Plan further provided that such an employee would no longer be considered disabled "if [he were] able to come back to work at The Travelers or if [he worked] elsewhere for wage or profit." Planned Protection at 64.

Sometime in 1989, Reidy alleges that he contacted the defendant's Employee Benefits Agent, Joan Lawson, to find out whether he could obtain paid employment while receiving disability benefits from the company. Plaintiff claims that he was told that he could work elsewhere so long as he did not earn more than he was collecting under the Plan. On August 1, 1989, plaintiff began working as a courier for A & S Delivery, earning $7.25 per hour.

In September, 1989, defendant arranged for Reidy to receive an independent medical examination from Dr. Roy Parenty at defendant's expense. Plaintiff informed Dr. Parenty of his courier job and believed that Dr. Parenty was defendant's agent and would therefore inform defendant of his job.

In a letter dated November 5, 1990, defendant' s company physician, Dr. Herbert Felsenfeld, advised Reidy that his treating physician, Dr. Mario Moretti, had indicated that he would be able to return to work in a light duty capacity. Dr. Felsenfeld informed Reidy that he would be expected to return to work at Travelers on November 19, 1990.

Reidy informed defendant that he was not capable of returning to his former two positions at the company because they were too stressful. Reidy instead asked for a position as a courier or filer. At that time, Reidy was aware that the company had courier positions in Hartford and was willing to work in the Hartford office as such. Reidy also informed Jeanne Erickson of the company's Corporate Human Resources Department that Travelers would have to develop guidelines for a job that Dr. Moretti could approve.

On December 4, 1990, Dr. Felsenfeld proposed a light duty job description that was intended to eliminate as much stress as possible and enable Reidy to return to work. Under that proposal, Reidy would have returned to his former position as a claims representative in the Subrogation Unit, where he would be given a 25% reduction in workload and would not have to deal directly with customers. By letter dated December 17, 1990, Dr. Moretti informed defendant that plaintiff would not be able to assume that proposed position. Plaintiff claims that, at that time, he was still experiencing severe headaches, memory loss and depression.

On February 14, 1991, defendant informed Reidy that it had just recently learned of his courier job with A&S and that, pursuant to the terms of its Sick Leave Plan, Reidy would no longer be considered disabled for purposes of receiving sick leave benefits because he was working elsewhere for wages. Plaintiff was told that he would be placed on unpaid leave as of March 4, 1991, but that his position at Travelers would remain open for four weeks. If plaintiff did not return to work within that time, defendant would assume that plaintiff had terminated his employment.

By letter dated March 12, 1991, Travelers informed plaintiff that his sick leave benefits would be extended for two weeks until March 25, 1991. Plaintiff was also informed that his unpaid leave would now commence as of that new date and extend for four weeks. If Reidy failed to return to work at the end of that period, he would be considered terminated.

On April 13, 1991, plaintiff requested an extension of his

unpaid leave until June 1, 1991, which defendant granted. When plaintiff did not report for work by the latter date, he was terminated. After his termination, Reidy claims that he began to deteriorate emotionally and, as a result, was forced to leave his courier position sometime in August or September, 1991. Reidy has not worked since that time.

In November, 1992, Reidy began seeing Dr. Leo Polizoti for his stress related medical problems. Dr. Polizoti characterized plaintiff's condition as permanent burnout and stated that plaintiff was "not able to work" and would have "a very difficult time functioning at a 'normal' level" even in his personal life. Dr. Polizoti further stated that plaintiff's disability appeared to be permanent at that time. Medical Report of Dr. Polizoti dated March 2, 1993.

II. PROCEDURAL HISTORY

On or about August 30, 1991, plaintiff claims that he mailed a "Charge of Discrimination" to the Massachusetts Commission Against Discrimination ("MCAD"), alleging age and handicap discrimination in violation of M.G.L. c.151B and c.93, § 103. In the cover letter which accompanied that Charge, plaintiff requested that a withdrawal form be sent to him after Travelers filed its position statement so that plaintiff could file a claim in court.

By a letter dated September 20, 1991, the MCAD informed plaintiff that it could not act upon his allegations of discrimination until he filed a formal complaint. In order to facilitate that procedure, the MCAD officer informed Reidy that he would have to meet with a representative of the agency to discuss further his situation. On September 26, 1991, plaintiff sent a letter to the MCAD in which he asked for a copy of Travelers' position statement and again requested a withdrawal form so that a private lawsuit could be brought. There was no further correspondence between plaintiff and the MCAD.

On or around October 7, 1991, Reidy filed a Complaint in the Massachusetts Superior Court, Worcester Division, alleging breach of contract, age discrimination in violation of M.G.L. c. 151B, handicap discrimination in violation of M.G.L. c. 93, §

103. The Complaint also contained a claim by Reidy's wife, Toni, for loss of consortium, and four separate claims for loss of nurture by each of Reidy's four minor children, Terrence, John, Brian and George. Defendant filed a notice of removal to this Court on November 1, 1991 on the grounds of diversity jurisdiction. On July 20, 1995, defendant filed the instant motion for summary judgment.

On or around October 10, 1991, plaintiff also filed a claim for workers' compensation pursuant to M.G.L. c. 152, §§ 34, 35. That claim was initially denied and plaintiff appealed. Three hearings were subsequently held before Administrative Law Judge Dianne L. Solomon of the Department of Industrial Accidents. On May 25, 1995, Judge Solomon found that plaintiff's emotional condition rendered him "incapacitated for any gainful employment." Decision of the Administrative Law Judge of the Department of Industrial Accidents at 14. Judge Solomon also found plaintiff's "incapacity to be total" with the exception of the 19 month period when he worked for A & S. Id. at 18. Plaintiff was awarded, and continues to receive, workers' compensation benefits.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment shall be rendered where the pleadings, discovery on file and affidavits, if any, show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the entire record in the light most favorable to the plaintiffs and indulge all reasonable inferences in their favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993).

The moving party bears the burden of showing that "there is an absence of evidence to support the non-moving party's case." FDIC v. Municipality of Ponce, 904 F.2d 740, 742 (1st Cir. 1990). If the movant does so, the burden then shifts to the non-moving party to establish affirmatively the existence of a genuine material issue of fact. Id. In deciding whether a factual dispute is genuine, this Court determines whether "the evidence

is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmovant's assertion of mere allegations or its denial of the pleadings is insufficient, without more, to establish a genuine issue of material fact. Fed. R. Civ. P. 56(e).

B. Legal Analysis

1. Breach of Contract

In Count I, plaintiff Reidy alleges that Travelers breached the terms of his employment contract with the company. Although the specific grounds for this breach of contract claim are not entirely clear from the Complaint, this Court is mindful of its duty to draw all reasonable inferences from the pleadings in favor of the plaintiff. Based upon that standard of review, this Court infers that plaintiff has alleged a breach of contract claim based upon a) breach of an express or implied employment agreement and b) unlawful termination on the basis of plaintiff's age and/or handicap.[1]

a. Breach of Express/Implied Employment Agreement

With respect to plaintiff's first ground for relief, plaintiff does not produce any evidence of a written employment agreement. Instead, he argues that there were "implied or expressed policies, procedures, or practices" that employees of Travelers would be treated fairly and terminated only for just cause. Complaint at 45. Because defendant terminated plaintiff "in violation of those implied or expressed terms", plaintiff claims that defendant prevented him "from performing the terms and conditions of his employment contract with Travelers." Id. at 46, 47.

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[1] In its memorandum in support of its motion for summary judgment, defendant addresses, and argues for the dismissal of, plaintiff's claim for breach of contract based upon the defendant's termination of plaintiff's disability benefits. Specifically, defendant argues that any such claim is preempted by the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144 (a) which states that "the provisions of this subchapter ... shall supersede any and all State laws insofar as they may now and hereafter relate to any employee benefit plan...." Plaintiff, in turn, responds that, because the discontinuance

Plaintiff relies upon 1) an employee manual and 2) his 23 year "tenure" with the company to argue that he had an implied employment agreement with the defendant. This Court is not persuaded by either argument.

First, in order to determine whether the terms of an employer's personnel manual can constitute a binding contract under Massachusetts law, this Court considers the following factors: whether the manual's terms were i) unilaterally modifiable, ii) merely hortatory, iii) negotiated in a particular instance, iv) specially emphasized by the employer, v) seasonably accepted by the employee, and vi) characterizable as specifying some period, of employment (or, alternatively, some definitive limit on the otherwise fluid nature of at-will employment). Pearson v. John Hancock Mut. Life Ins. Co., 979 F.2d 254, 256 (1st Cir. 1992); Jackson v. Action for Boston Community Development, 403 Mass. 8, 14-15 (1988).

Plaintiff has submitted no evidence relating to any of these factors. Indeed, the employee handbook specifically provided that both employee and employer were free to terminate an employee's employment "at any time, for any or for no reason, and with

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of his disability benefits is evidence of discrimination towards him, his claim for loss of benefits is only "peripheral" to the ERISA plan and thus does not sufficiently "relate to" an employee benefit plan so as to warrant ERISA preemption.

This Court need not address the merits of these arguments because plaintiff's Complaint can not reasonably be read to include a claim for breach of contract claim based upon the termination of Reidy's sick ' leave benefits. At most, plaintiff alleges in paragraph 50 of his Complaint that "his disability benefits ceased on June 1, 1991." In the following paragraph, plaintiff states, in reference to the sum of the 50 paragraphs preceding it, that "[t]his count is for breach of employment contract." Without more, this Court will not read into the Complaint a claim seeking relief for the termination of Reidy' s sick leave benefits. Where a plaintiff has not spelled out his theories of relief clearly and distinctly in his Complaint, this Court is not obliged to infer all potential alternative grounds for relief. See Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 183 (1st Cir. 1989); Paterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988).

or without advance notice." The Travelers Employee Handbook at 15. This Court therefore concludes that no reasonable jury could find that an implied contract was formed based upon the employee handbook.

Second, plaintiff argues that an "implied contract preventing an unjust dismissal may also be created when the employee's length of service is considered." Plaintiffs' Memorandum in Opposition at 4. Because Reidy had worked for Travelers for over 20 years, he claims that he had a "reasonable expectation" that, due to his tenure with the company, "the Company would follow the procedures of fundamental fairness" if it ever terminated him. Id. at 5.

In support of that argument, plaintiff cites one Massachusetts case, McKinney v. National Dairy Council, 491 F.Supp. 1108 (D.Mass. 1980), which held that, where the New York Statute of Frauds prevented enforceability of an employment contract, termination of an at-will employee on the basis of his age after 19 years of service was actionable as a violation of the implied obligation of good faith and fair dealing. Id. at 1122. A "compelling" factor in that decision was the fact that, when plaintiff first began working for his employer, he had clearly and explicitly indicated that he was looking for what would be the last job in his working career. Id. Plaintiff Reidy, by contrast, has not presented any evidence that would support a finding of an implied employment contract based on his tenure with Travelers. He relies simply upon the fact that he always received "above average appraisals and steady promotions until the discriminatory behavior commenced." Plaintiffs' Memorandum in Opposition at 5. This Court concludes that no reasonable jury could conclude that an implied contract was formed based upon Reidy's years of service at the company.

b. Unlawful discrimination

Plaintiff's second ground for relief on his breach of employment contract claim is based upon his allegation that he was wrongfully terminated on the basis of his age and/or handicap. Complaint at 21-25, 40-43, 47. Massachusetts courts have

made clear that where the legislature has already provided a comprehensive remedial statute such as M.G.L. c.151B, the state's discrimination in employment statute, Massachusetts courts will not create a new common law action based upon the public policy expressed in that statute. Charland v. Muzi Motors, Inc., 417 Mass. 580, 585 (1994) (adopting the analysis and conclusion of Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 513 (1985)). To the extent that Reidy's common law claim for breach of contract is based upon Traveler's allegedly discriminatory employment practices, it is preempted by M.G.L. c.151B.

Defendant's motion for summary judgment on Count I will, therefore, be ALLOWED.

2. Violation of M.G.L. c. 151B

In Count II, Reidy alleges that Travelers and its duly authorized agents and employees intentionally "engaged in a pattern or practice of discriminating against older employees by forcing them out" through harassment and the creation of a stressful environment. Complaint at 54, 55. This claim for age discrimination in violation of M.G.L. c.151B in Count II is accompanied by a separate claim for handicap discrimination in violation of M.G.L. c. 93,§ 103 in Count III. Because M.G.L. c. 151B is the exclusive state law remedy for employment discrimination complaints, it preempts claims brought under M.G.L. c.93, § 103. See Woods v. Friction Materials Friction Materials, Inc., 30 F.3d 255, 264 (1st Cir. 1994). The defendant's motion for summary judgment on Count III will, therefore, be ALLOWED.

In his brief, plaintiff argues both of his claims for age and handicap discrimination under Chapter 151B. See Plaintiffs' Memorandum in Opposition at 15-18. Although a strict reading of his Complaint would bar any claim for handicap discrimination under Chapter 151B because it was not properly pleaded, this Court will extend plaintiff the benefit of the doubt and analyze both his age and handicap discrimination claims under that statute.

a. Failure to follow administrative procedures

Defendant argues that plaintiff's discrimination claim should be

dismissed because Reidy failed to follow proper administrative procedures with the MCAD prior to filing suit in this Court.

Under Massachusetts case law, it is clear that a plaintiff alleging employment discrimination has "two largely independent avenues for redress... one through the MCAD ... and the other in the courts." Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988). A plaintiff "may maintain a civil action only if [he] has previously filed a timely complaint with the [MCAD] and ninety days have passed (or a commissioner has assented [in writing] to an earlier filing)." Id. at 816; M.G.L. c.151B. § 9. A plaintiff may not otherwise resort to the courts for a discrimination claim that is within the jurisdiction of the MCAD unless he has followed these procedures. See Charland, 417 Mass. at 583-584.

In this case, plaintiff has presented evidence which, if credited, would show that:

1) by letter dated August 30, 1991, his attorney asked the MCAD to file an enclosed Charge of Discrimination on plaintiff's behalf and to send a withdrawal form so that plaintiff could file a private civil lawsuit.
2) by letter dated September 20, 1991, an officer of the MCAD wrote to plaintiff directly and informed him that he would have to file a formal complaint with the agency before the MCAD could act on it. The officer also informed plaintiff that an MCAD representative would need to meet with him to discuss further his situation before an investigation could proceed.
3) by letter dated September 26, 1991, plaintiff's attorney again asked the MCAD for a withdraw al form so that plaintiff could bring a private lawsuit.

Plaintiff has presented no evidence of any other correspondence with the MCAD but contends that the above letters indicate that a timely charge of discrimination was indeed filed.

The MCAD, however, has no record of the filing of that charge. See Deposition of Alan Cassella at 18-19; letter from Nancy L. Barnes to Jay M. Presser dated May 4, 1992; see also Affidavit of Robert L. Sanders. Plaintiff responds that the MCAD must have lost his charge and argues that he should not be prejudiced by such an administrative error. Plaintiff thus asks this Court to use its equitable powers to permit the instant lawsuit to proceed.

For the purposes of this summary judgment motion, this Court is required to draw all reasonable inferences in favor of the plaintiff and therefore assumes that he did indeed file his charge with the MCAD on August 30, 1991. Nevertheless, the fact remains that plaintiff did not wait 90 days before filing the instant lawsuit in Massachusetts Superior Court on October 7, 1991. Nor has plaintiff submitted any evidence of a withdrawal letter from the MCAD which would have allowed him to seek earlier relief in the courts. Therefore, this Court concludes that, as a matter of law, plaintiff failed to follow the proper administrative procedures for filing his employment discrimination claims. On that ground alone, defendant's motion for summary judgment on Count II will be ALLOWED.

b. Plaintiff's Substantive Claims

Notwithstanding plaintiff's failure to follow those required administrative procedures and for the sake of completeness, this Court will consider plaintiff's substantive claims for age and handicap discrimination.

Plaintiff alleges that, in terminating his employment on June 1, 1991, defendant unlawfully discriminated against him on the basis of his age and handicap. In examining a claim for age and/or handicap discrimination under Chapter 151B where there is no direct evidence of such discrimination, the Court applies the three-stage burden-shifting framework followed by Massachusetts courts, as recently clarified by the Supreme Judicial Court of Massachusetts in Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437 (1995).

At the first stage of the analysis, plaintiff must establish a prima

facie case of employment discrimination. If he carries that burden, it will be presumed that defendant engaged in age and/or handicap discrimination. Blare, 419 Mass. at 441. The burden then shifts to the defendant to rebut that presumption by articulating a legitimate, non-discriminatory reason for its action. Id. If defendant successfully does so, the presumption of discrimination created by the prima facie case drops from the case and the burden shifts back to plaintiff to show that defendant's articulated justification is not true but a pretext. Id. at 443. Unlike the burden required under the federal antidiscrimination statute, a plaintiff alleging a violation of M.G.L. c.151B need not present evidence of defendant's alleged discriminatory animus to survive defendant's motion for summary judgment. Id.

i. Age Discrimination

Under M.G.L. c. 151B, § 4, "[i]t shall be an unlawful practice [f]or an employer in the private sector, by himself or his agent, because of the age of any individual,... to discharge from employment such individual..." In order to establish a prima facie case of age discrimination, plaintiff must produce evidence that 1) he is older than 40 years old, 2) he performed his job at an acceptable level, 3) he was terminated, and 4) defendant sought to fill plaintiff's position by hiring another individual with qualifications similar to his. Blare, 419 Mass. at 441.

Plaintiff was born on July 20, 1941 and was 49 years old at the time of the alleged discriminatory act of termination. Elements one and three of the prima facie case have thus been met.

With respect to the second element of the prima facie case, plaintiff alleges that he was promoted at various points during his career due to strong work performance. Plaintiffs' Local Rule 56.1 Statement at 2-3. Plaintiff further alleges that he always received above average annual appraisals. Complaint at 11. Plaintiff admits that he allowed the statute of limitations to run on several files for which he was responsible and that he was often reprimanded for long and excessive coffee breaks, lunches and personal telephone calls. Plaintiff's burden is not, however, onerous at this preliminary stage of the analysis. See Woodman v.

Haemonetics Corp., 51 F.3d 1087, 1091 (1st Cir. 1995) (discussing plaintiff's burden in the context of the federal Age Discrimination in Employment Act). This Court therefore assumes that plaintiff's job performance was acceptable.

Plaintiff has not, however, submitted any evidence to support the fourth element of the prima facie case, that is, that Travelers sought to replace Reidy with an employee with similar qualifications. Rather, plaintiff merely states that he "believes" that he was replaced by a younger person. Complaint at 56. Mere allegations that he was so replaced, without more, are insufficient to establish a prima facie case of age discrimination. Based upon that deficiency alone, plaintiff's substantive claim of age discrimination fails without this Court having to reach the second or third stage of the burden-shifting framework.

Had plaintiff succeeded in establishing a prima facie case of age discrimination, the burden would have then shifted to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decision. In this case, Travelers produced evidence that it 1) terminated the plaintiff's disability benefits and placed him on unpaid leave because plaintiff was found to have been working as a paid courier for A&S Delivery, contrary to the terms of the company' s disability plan, and 2) terminated the plaintiff's employment only after affording him repeated opportunities to return to his former position with a reduction in workload. See Letters from Jeanne Erickson to Reidy dated February 14, 1991, March 12, 1991 and March 28, 1991. Based upon that credible evidence, this Court concludes that Travelers would have met its burden of providing lawful reasons for its employment decision.

The burden would then have shifted back to the plaintiff to show "either that the employer's reason was a pretext or that the actual reason for the adverse hiring decision was discrimination" in order to survive defendant's motion for summary judgment. Blare 419 Mass. at 445. Plaintiff presented no evidence in that regard. Aside from mere allegations in his Complaint that defendant "engaged in a pattern or practice [of] discriminating against

older workers by increasing their workload beyond their ability to perform it successfully" for the express purpose "of forcing them to quit", see Complaint at 24, 25, plaintiff neither set forth any specific facts nor presented any evidence to show that 1) the defendant's articulated reason was more likely than not a pretext for actual discrimination, or 2) the actual motivation for Travelers' actions was discrimination.

For all the reasons stated herein, the defendant's motion for summary judgment on plaintiff's age discrimination claim will, therefore, be ALLOWED.

ii. Handicap Discrimination

M.G.L. c.151B, § 4 also provides that "[it shall be an unlawful practice...

> [f]or any employer, personally or through an agent, to dismiss from employment ... or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business."

In order to establish a prima facie case of handicap discrimination in employment under Chapter 151B, plaintiff must produce evidence showing that 1) he is a handicapped person, 2) in spite of his handicap, he is qualified for the position from which he was terminated, and 3) he was fired solely because of his handicap. Garrity v. United Airlines, Inc., 421 Mass. 55, 60 (1995).

With respect to the first element, plaintiff is "handicapped" within the meaning of the statute if he a) has a physical or mental impairment which substantially limits one or more major life activities, such as learning and working; b) has a record of hav-

ing such impairment; or c) is regarded as having such impairment. M.G.L. c.151B, §§ 1(17), 1(20). Reidy has submitted medical reports that indicate that he suffered, and continues to suffer, from mental impairments which substantially limit his ability to work. See Letter from Dr. Moretti to Travelers dated December 17, 1990; letter from Dr. Weiss to Joseph E. McGuire, Esq. dated December 10, 1991. The Court concludes that plaintiff has established the first element of his prima facie case.

In order to establish the second element, plaintiff must show that, despite his handicap, he was qualified for the position from which he was terminated. Section 1(16) of Chapter 151B defines a "qualified handicapped person" as "a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap." An employer may, however, refuse to accommodate any handicap that necessitates the substantial modification of employment standards. Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 542 (1995).

Plaintiff concedes that he was incapable of performing his previous job as a claims representative in the Auto Damage Unit after 1988, even with a 25% reduction in workload. Plaintiffs' Memorandum in Opposition at 7. Plaintiff, in fact, applied for and received disability benefits because he was unable to perform the material duties pertaining to his position. Nevertheless, Reidy contends that he was a "qualified handicapped person" because he was able to perform the job duties of a courier or filer during the relevant time period. Because Travelers did not offer him such a position, Reidy alleges that Travelers failed to provide reasonable accommodation to his handicap as required under state law. Id.

The Court is not persuaded by plaintiff's reasoning. By plaintiff's own admission, he was not, at any time between the day he left his position at Travelers to the present, capable of performing the duties of a claims representative. The question then is whether or not there is at least a genuine issue of material fact

that, if Travelers made reasonable accommodation to Reidy's handicap, he would have been able to perform that job. See August v. Offices Unlimited, Inc., 981 F.2d 576, 580 (1st Cir. 1992). Plaintiff basically argues that he would have been able to perform the essential job functions of a claims representative if defendant had offered him a position as a courier or filer. That argument is without logic. Furthermore, while employers may not deny an employee alternative employment opportunities that are reasonably available under the employer's existing policies, employers "are not required to find another job for an employee who is not qualified for the job he or she was doing...." School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987). Because plaintiff in this case admits that he could not perform any of the functions of a claims representative, regardless of accommodation, the Court concludes that plaintiff has failed to show that he was "qualified" for the position from which he was discharged.

Even if plaintiff had shown that he was a qualified handicapped person, he has not submitted any evidence that he was terminated solely because of his handicap, the third element of the prima facie case. To the contrary, plaintiff concedes that he could not have returned to his prior position because of his handicap.

For the reasons stated in this section as well as those stated above, the defendant's motion for summary judgment on plaintiff's handicap discrimination claim will, therefore, be ALLOWED.

3. Loss of Consortium and Loss of Nurture

The claims for loss of consortium by Reidy's wife and loss of nurture by Reidy's minor children are based upon the handicap discrimination claim in Count III. See Complaint at 71-84. Because the handicap discrimination claim will be dismissed, the loss of consortium and loss of nurture claims must also be dismissed. Furthermore, with respect to the former claim, under Massachusetts law, a loss of consortium claim can only be brought when a claimant's spouse has a valid tort claim. Sena v. Commonwealth, 417 Mass. 250, 264 (1994); Mouradian v. General Elec. Co., 23 Mass. App. Ct. 538, 544 (1987). There is

no such tort claim in this case.

Defendant's motion for summary judgment on Counts IV, V, VI, VII and VIII will, therefore, be ALLOWED.

ORDER

For the foregoing reasons, defendant's motion for summary judgment on all counts is ALLOWED.

So Ordered.

\s_____

Nathaniel M. Gorton
United States District Judge

DATED: June 3 , 1996

APPENDIX C

Rescript Opinions.

EILEEN ANDREWS VS. ARKWRIGHT MUTUAL INSURANCE COMPANY. December 5, 1996. *Massachusetts Commission Against Discrimination. Employment, Discrimination. Anti-Discrimination Law,* Sex.

A Superior Court judge allowed the defendant's motion for summary judgment. He determined that the plaintiff's complaint of sexual discrimination was untimely filed with the Massachusetts Commission Against Discrimination (MCAD). See G. L. c. 151B (1994 ed.). The plaintiff appealed. We transferred the case to this court on our own motion. We affirm.

Eileen Andrews began employment with Arkwright Mutual Insurance Company (Arkwright) in December, 1987. Throughout her tenure with Arkwright, her immediate supervisor was Esther Sprano.

Arkwright began a reorganization of their departments in early 1992. On January 14, 1992, Sprano announced to the communications department that two positions would likely be cut as a part of the reorganization process. Sprano crafted plans to shift responsibilities within the department and designed two plans: one where Andrews and another associate would be terminated and another where only Andrews would be terminated.

On January 23, 1992, Andrews informed Sprano that she was pregnant. Sprano responded, "What do you want me to do about it?" and also said, "I hate working with pregnant women." Approximately six days later, Andrews was terminated. She was the only person in the department to be terminated. Andrews hired a lawyer to pursue a claim that her termination was based on her pregnancy.

On May 21, 1992, Andrews's attorney sent a "letter of inquiry" to the MCAD, advising the agency that Andrews would be pursuing a claim against her former employer. She sought a hearing

date to discuss the merit of the claim. She also filed a claim in the Superior Court.

After a series of communications between Andrews's attorney and the MCAD, Andrews filed a complaint nunc pro tunc to May 21, 1992, the date of initial communication with MCAD. She was advised to do so by an employee of the MCAD. The general counsel of MCAD also wrote a letter which stated, "the Commission has determined to take no further action on this matter. The commission considers this case closed and the statute of Limitations issue is properly before the Court in which the civil action in this matter is now pending."

A plaintiff wishing to pursue a discrimination claim under G. L. c. 151B must first submit a complaint to the MCAD within six months of the alleged unlawful conduct. G. L. c. 151B, § 5; 804 Code Mass. Regs. § 1.03(2)(1993). The plaintiff conceded at oral argument that the initial inquiry letter was not a complaint.[1] This concession, absent a tolling of the statutory filing period, is fatal to her G. L. c. 151B claim.

The plaintiff next argues that the complaint should be permitted nunc pro tune based on equitable tolling. See Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817 (1988) (holding equitable tolling available for G. L. c. 151B claims). Equitable tolling is available in circumstances in which the plaintiff is excusably ignorant about the six-month statutory filing period, Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 896 (1st Cir. 1992), or where the defendant or the MCAD has affirmatively misled the plaintiff. See, e.g., Toombs v. Greer-Smyrna, Inc., 529 F. Supp. 497 (M.D. Tenn. 1982), affd, 709 F.2d 1509 (6th Cir. 1983). Neither circumstance applies.

The plaintiff was represented by counsel two months before the statutory filing deadline of six months. Constructive knowl-

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[1] A complaint must be signed by the party, notarized, and give sufficient detail of the act or acts of discrimination. 804 Code Mass. Regs. § 1.03 (1993). The inquiry letter did not meet these requirements. Additionally, the plaintiffs did not serve this letter on the defendant.

edge of all procedural requirements is imputed to a plaintiff who retains an attorney. See Mercado-Garcia v. Ponce Fed. Bank, supra; Conroy v. Boston Edison Co., 758 F. Supp. 54, 61 (D. Mass. 1991). There was no evidence that Arkwright engaged in any misconduct that may have dissuaded Andrews from filing a complaint. Equitable tolling is not available on that basis. There was no affirmative misleading by the MCAD. While the inquiry letter was not handled expeditiously, the obligation to file a complaint within the required time limit still rests with the attorney. On the record before us, the MCAD never gave erroneous information to Andrews or her attorney as to the correct filing date, nor did they refuse to accept a properly presented timely complaint.

Judgment affirmed.

Maryann C. Murphy for the plaintiff.
Lisa J. Damon (*Allan C. Cave, Jr.*, with her) for the defendant.